

STATE OF MICHIGAN
IN THE SUPREME COURT

HELEN YONO,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF
TRANSPORTATION,

Defendant-Appellant.

Supreme Court No. 150364

Court of Appeals No. 308968

Court of Claims No. 11-117-MD

**BRIEF OF AMICUS CURIAE MICHIGAN MUNICIPAL RISK
MANAGEMENT AUTHORITY IN SUPPORT OF MICHIGAN
DEPARTMENT OF TRANSPORTATION'S BRIEF ON APPEAL**

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STATEMENT OF ISSUES PRESENTED

I. IS THE COURT OF APPEALS' CONCLUSION THAT THE PARALLEL PARKING AREA IS PART OF THE "HIGHWAY" WITHIN THE MEANING OF THE GTLA CONTRARY TO THE ESTABLISHED LAW OF THIS STATE MANDATING A NARROW CONSTRUCTION OF THE EXCEPTIONS TO GOVERNMENTAL IMMUNITY?

The Court of Appeals said "No."

Plaintiff-Appellee answers: "No."

Defendant-Appellant MDOT answers: "Yes."

Amicus curiae MMRMA answers: "Yes."

II. SHOULD QUESTIONS OF FACT ON A MOTION FOR SUMMARY DISPOSITION INVOLVING GOVERNMENTAL IMMUNITY BE RESOLVED BY THE TRIAL COURT AT AN EVIDENTIARY HEARING?

The Court of Appeals declined to determine "the appropriate method for resolving factual disputes under MCR 2.116(C)(7)"

Plaintiff-Appellee asserts this issue should not be considered in this appeal because it is unnecessary.

Defendant-Appellant MDOT answers: "Yes."

Amicus curiae MMRMA answers: "Yes."

STATEMENT OF INTEREST

The Michigan Municipal Risk Management Authority (MMRMA) is a public entity self-insurance pool, created in 1980 under MCL 124.1 *et seq.*, that provides liability and property coverage to its membership of more than 300 Michigan local governmental units. Thirty years after its inception, the MMRMA is the largest liability and property pool in Michigan. Members include over 200 cities, counties, townships, and special districts combined, as well as dozens of other governmental entities, including libraries, medical care facilities, fire departments, 911/dispatch departments, courts, transportation departments, and cable services. The MMRMA appears before this Court as a representative of its members throughout Michigan, all of whom could potentially be affected by the issues involved in this case.

At issue in this case is whether a parallel parking area is a “highway” within the meaning of the highway exception to governmental immunity. The MMRMA is particularly concerned with the far-reaching consequences of an expansion of this Court’s settled, narrow interpretation of the highway exception to the broad immunity granted to governmental entities. If the Court of Appeals’ broad interpretation of the exception in this case is allowed to stand, it will economically affect municipal governmental entities throughout the state of Michigan, which in turn will impact the MMRMA as

the public entity self-insurance pool that provides liability and property coverage to these entities.

Also of significant importance to the MMRMA is the issue of whether questions of fact on a motion for summary disposition involving governmental immunity should be resolved by the trial court at an evidentiary hearing prior to trial. This is important because the purpose of governmental immunity is to protect the municipality, not only from liability, but from the trial itself. Allowing factual determinations regarding the application of governmental immunity to be decided at trial would render illusory the immunity afforded by the GTLA. In addition, the municipality could incur completely unnecessary costs associated with trial preparation and discovery, as well as the investment of time by its employees. This will also impact the MMRMA.

INTRODUCTION

This Court's Order of June 10, 2015, directed the parties to brief several issues, including (a) whether a vehicle engages in "travel" under MCL 691.1402(1) when it parks in, including pulls into and out of, a lane of a highway designated for parking; and (b) whether questions of fact on a motion for summary disposition involving governmental immunity under

MCR 2.116(C)(7) must be resolved by the trial court at a hearing or submitted to a jury. This Court invited the Michigan County Road Commission Self-Insurance Pool, the County Road Association of Michigan, the Michigan Municipal League and the Michigan Townships Association to file briefs amicus curiae. Because the issue of governmental immunity – and more specifically, statutory interpretation of the language of the exceptions to the GTLA – is of vital importance to the defense of governmental entities, the MMRMA files this amicus curiae brief on the two issues above as defined by this Court.

LAW AND ARGUMENT

I. THE COURT OF APPEALS' CONCLUSION THAT THE PARALLEL PARKING AREA IS PART OF THE "HIGHWAY" WITHIN THE MEANING OF THE GTLA IS CONTRARY TO THE ESTABLISHED LAW OF THIS STATE MANDATING A NARROW CONSTRUCTION OF THE EXCEPTIONS TO GOVERNMENTAL IMMUNITY.

For most of American history, federal, state, and local governments could not be sued in their own courts without their consent. However, in the twentieth century, as government began to undertake more activities, the need for some sort of protection against government harm of private citizens became necessary. As a result, legislatures began to extend the right to sue more generally, the Michigan legislature doing so in the Governmental Tort

Liability Act (GTLA) of 1964. What followed, however, were two decades of legal confusion. This Court then stepped in with a sweeping reassertion of governmental immunity, which the legislature subsequently accepted and codified by amendments to the GTLA.

A. The history of the GTLA demonstrates that the Legislature did not intend the language of the exceptions to governmental immunity to be read expansively.

Governmental immunity is “a characteristic of government” that was historically recognized at common law until it was abrogated by this Court in *Williams v Detroit*, 364 Mich 231; 111 NW2d 1 (1961). When it enacted the Governmental Tort Liability Act (GTLA), the Legislature reinstituted and preserved this characteristic. *Costa v Cmty Emergency Med Services*, 475 Mich 403, 410 n 2; 716 NW2d 236 (2006). This fact was recognized by this Court in *Ross v Consumers Power Co*, 420 Mich 567, 618; 363 NW2d 641 (1984): “The legislature's refusal to abolish completely sovereign and governmental immunity, despite this Court's recent attempts to do so,” the Court declared, “evidences a clear legislative judgment that public and private tort-feasors should be treated differently.” *Ross*, 420 Mich at 618. It did not take a legislative decree to *create* governmental immunity, but a legislative act to *preserve* the doctrine that this Court had historically

recognized as a characteristic of government. *Mack v City of Detroit*, 467 Mich 186, 202; 649 NW2d 47 (2002).

As a general rule, under the GTLA, MCL 691.1404, et seq., a governmental entity is immune from tort liability for actions that accrue while it is engaged in the performance of a governmental function. MCL 691.1407. This Court has observed that “a central purpose” of governmental immunity is “to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity.” *Mack*, 467 Mich at 203, n 18.

This immunity is subject to five statutory exceptions. It is clear from the circumstances surrounding the enactment of the GTLA that the Legislature did not intend an expansive reading of the language of these exceptions. See *Reardon v Dep't of Mental Health*, 430 Mich 398, 409; 424 NW2d 248 (1988)(circumstances surrounding the enactment of the GLTA persuaded the court that the Legislature did not intend an expansive reading of the public building exception).

B. This Court's mandate that the exceptions to governmental immunity be narrowly drawn dictates that the highway exception be limited to only the portion of the highway designed for vehicular travel.

In *Ross, supra*, this Court redefined the application of statutory immunity to governmental entities. It was *Ross* that established the basic

principle that the immunity of governmental entities is broad but the exceptions are to be narrowly construed. *Ross*, 420 Mich at 618. Drawing on this basic principle, this Court has consistently interpreted the language of the five exceptions to governmental immunity narrowly.

For example, in *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000), the Court construed the phrase “resulting from” as used within the motor vehicle exception, which imposes liability for a plaintiff’s injuries “resulting from” the negligent operation of a government vehicle. Recognizing that the motor vehicle exception must be narrowly construed and applying the required narrow construction, the Court held that a plaintiff’s injuries did not “result from” the operation of a motor vehicle where the pursuing police vehicle did not hit the fleeing car or otherwise physically force it off the road or into another vehicle or object. Likewise, the *Robinson* Court distinguished the Legislature’s use of the word “the” rather than “a” and held that the phrase “the proximate cause” as used in the employee provision of the GTLA, MCL 691.1407(2), means “the one most immediate, efficient, and direct cause preceding an injury, not ‘a proximate cause.’” By giving meaning to the specific language chosen by the Legislature, the Court rejected the application of traditional tort law theories of causation. *Robinson*, 462 Mich at 462. See also *Beals v State*, 497 Mich 363

(2015)(applying the rationale in *Robinson* to conclude that a lifeguard's failure to intervene in drowning cannot reasonably be found to be "the proximate cause" of death where the far more "immediate, efficient, and direct cause" of death was that which caused the decedent to remain submerged in the deep end of the pool without resurfacing, even if that cause is unknown).

Another example of the clear application of this rule of narrow construction can be found in this Court's interpretation of the public building exception, MCL 691.1406. In *Reardon v Dept of Mental Health*, *supra*, this Court held the government is liable for injuries caused by a dangerous or defective condition "of" the building but not for injuries "in" the building, the broader application previously given the exception. This Court noted that the Legislature's use of the terms "repair" and "maintain," and its choice of the phrase "dangerous or defective condition of a public building" – specifically, its choice of the word "of" rather than "in" – indicated the Legislature's intent that the exception apply only where the physical condition of the building itself causes the injury. The Court supported its conclusion by noting the "broad scope of governmental immunity and the concomitant narrowness of the exceptions." *Reardon*, 430 Mich at 411-12.

Moreover, in *Renny v Michigan Dept of Transportation*, 478 Mich 490; 734 NW2d 518 (2007), this Court considered whether a design defect claim was cognizable under the public building exception to governmental immunity, MCL 691.1406. In that case, the plaintiff was leaving a rest stop building when she slipped and fell on a patch of ice on the sidewalk in front of the doorway. She sued the Michigan Department of Transportation (MDOT), alleging that because of its failure to install gutters and downspouts around the building, snow and ice accumulated on the sidewalk in front of the building, which created a dangerous condition. This Court agreed with MDOT that the plain language of MCL 691.1406 did not support a design defect claim. The Court relied on rules of statutory construction to hold that the duty to repair or maintain did not encompass a duty to design or redesign the public building in a particular manner. *Id.* at 524. It stated that “design” and “repair and maintain” are “unmistakably disparate concepts, and the Legislature’s sole use of ‘repair and maintain’ unambiguously indicates that it did not intend to include ‘design defect claims within the scope of the public building exception.’” *Id.* at 500-501.

The Court has also applied a narrowing construction to the proprietary function exception, MCL 691.1406. In *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998), this Court concluded that the fact that a

governmental agency produces a pecuniary profit is not conclusive evidence of a proprietary function. Rather, the Court determined that the intended purpose of the activity, whether a profit is actually generated, where the profit is deposited and how it is used, are important considerations in determining when a government unit is engaged in a proprietary function. *Coleman*, 456 Mich at 621-623.

Similarly, in *Nawrocki v Macomb Cty Road Commn*, 463 Mich 143, 160; 615 NW2d 702 (2000), this Court resolved to “return to a narrow construction of the highway exception predicated upon a close examination of the statute's plain language, rather than merely attempting to add still another layer of judicial gloss to those interpretations of the statute[.]” *Nawrocki*, 463 Mich at 150, 180. The *Nawrocki* Court held that the duty of government entities under the highway exception “is only implicated upon their failure to repair or maintain *the actual physical structure of the road bed surface, paved or unpaved, designed for vehicular travel*, which in turn proximately causes injury or damage.” *Id.* at 183 (emphasis added).

Likewise, in *Grimes v Michigan Dept of Transp*, 475 Mich 72; 715 NW2d 275 (2006), this Court once again examined the language of the highway exception, and extended the *Nawrocki* holding by overruling *Gregg v State Highway Department's* conclusion that a shoulder is “designed for

vehicular travel.” The Court noted that *Gregg*’s holding was both internally inconsistent and appealed to inappropriate methods of statutory construction. *Grimes*, 475 Mich at 83. Consistent with the plain language of the highway exception and the applicable rules of statutory construction, the Court concluded that the Legislature limited the highway exception to the segment of the “improved portion of the highway” that is “designed for vehicular travel,” which does not include the shoulder. In reaching this conclusion, the Court adopted a narrow view of the term “travel” that excludes the shoulder from the highway exception. *Grimes*, 475 Mich at 91.

In light of *Ross*’s mandate that the exceptions to the government’s immunity are narrowly drawn, and this Court’s clear and consistent application of that principle of statutory construction, the Legislature’s intended use of the phrases “improved portion of the highway” and “designed for vehicular travel” in the highway exception should be read in the narrowest sense. If the Legislature had intended to include any and all improved portions of the highway such as parallel parking spaces, it would not have taken the additional step to further limit the highway exception to only those portions of the highway that are designed for vehicular travel. See *Grimes*, 475 Mich at 91.

Furthermore, when interpreting the highway exception, this Court has already rejected a broad definition of “travel,” which would include “the shortest incremental movement by a vehicle on an improved surface.” *Id.* at 89 (citing Random House Webster's College Dictionary (1995)). “Adopting a broad definition of ‘travel’ would read any meaning out of the phrase ‘designed for vehicular travel.’” *Grimes*, 475 Mich at 89. As this Court succinctly stated in *Grimes, supra*:

It did not intend to extend the highway exception indiscriminately to every “improved portion of the highway.” Otherwise, it would not have qualified the phrase. Rather, it limited the exception to the segment of the “improved portion of highway” that is “designed for vehicular travel.” Because the Legislature created this distinction, it believed there are improved portions of highway that are not designed for vehicular travel. Hence, this Court ought to respect this distinction as we parse the statutory language.

Plaintiffs in effect urge this Court to adopt the expansive definition of “travel.” If “travel” is broadly construed to include traversing even the smallest distance, then it must follow that every area surrounding the highway that has been improved for highway purposes is “designed for vehicular travel” since such improved portions could support even momentary vehicular “travel.”

Id. at 89-90.

The bottom line is that the mere fact that the public uses a portion of the highway for vehicular travel does *not* mean that it is designed for that use. Here, the lane in which the alleged defect was located was designed for

parallel *parking*, which by definition is contrary to the term travel.¹ The Court of Appeals erroneously concluded that the parallel parking area was “designed for vehicular travel” merely because vehicles sometimes used the area to merge into the travel lane or to make a right turn when the lane is not occupied by vehicles. Such a broad, all-encompassing application provided by the Court of Appeals is contrary to this Court's decisions and should be reversed.

C. The Court of Appeals holding runs contrary to the purposes of governmental immunity.

The Court of Appeals' broad construction of the highway exception is contrary to the very principle and purpose of governmental immunity. To construe the highway exception so broadly to the point that it subjects the governmental entity to ordinary tort liability for all highway accidents contravenes the Legislature's intent in providing governmental immunity in the first place. Reading the exception too broadly results in an unrealistic burden on governmental entities to make highways completely safe or face liability. The legislature did not intend to place this impossible burden on governmental entities.

¹ See Merriam-Webster.com. Merriam-Webster, n.d. Web. 23 Sept. 2015. <http://www.merriam-webster.com/dictionary/park> (defining “park” as “to bring (a vehicle) to a stop and keep standing at the edge of a public way”).

II. QUESTIONS OF FACT ON A MOTION FOR SUMMARY DISPOSITION INVOLVING GOVERNMENTAL IMMUNITY SHOULD BE RESOLVED BY THE TRIAL COURT AT AN EVIDENTIARY HEARING PRIOR TO TRIAL.

On appeal, Plaintiff argues that this issue is not properly before this Court because this case originated in the Court of Claims, and the Court of Claims Act does not provide for jury trials. Juries are available, however, to plaintiffs seeking relief from other governmental entities. Furthermore, there is no “rule” against this Court sua sponte raising and deciding an issue. See *Mack*, 467 Mich 1211; 654 NW2d 563 (YOUNG, J., concurring)(citing by way of example several United States Supreme Court cases where the Court has sua sponte raised and decided issues neither raised nor briefed by the parties).

Trial courts have been increasingly relying on “questions of fact” to deny motions for summary disposition, thereby requiring parties to either settle the case or go to trial. Where a governmental entity is involved, such a ruling goes against the very purpose of governmental immunity: to protect the governmental body, not only from liability, but from the trial itself. See *Mitchell v Forsyth*, 472 US 511 (1985); *Walsh v Taylor*, 263 Mich App 618, 624; 689 NW2d 506, 512 (2004).

MCR 2.116(C)(7) permits summary disposition where the claim at issue is barred by governmental immunity. *Maiden v Rozwood*, 461 Mich

109, 119; 597 NW2d 817 (1999). It is well-settled that when the facts are not in dispute, the question of whether the claim is barred by immunity is an issue of law for the court. A problem arises, however, where there are questions of fact that must be decided to resolve the ultimate issue of whether governmental immunity applies.

In *Dextrom v Wexford Co*, 287 Mich App 406, 431; 789 NW2d 211 (2010), the Michigan Court of Appeals addressed the best approach for resolving immunity questions where there are factual disputes present:

[T]o the extent that the trial court envisioned that such further inquiry and clarification would be arrived at during a *trial*, with either the court sitting as a finder of fact or a jury serving the same function, we disagree. A *trial* is not the proper remedial avenue to take in resolving the factual questions under MCR 2.116(C)(7) dealing with governmental immunity. [Emphasis in original.]

Therefore, where there are questions of fact that must be decided to resolve the ultimate issue whether governmental immunity applies – which is a question of law for the court – the trial court should hold an evidentiary hearing to determine whether the municipality is entitled to summary disposition on the ground of governmental immunity. See *id.* at 432–433.

The importance of resolving immunity questions as early as possible in litigation is highlighted by MCR 7.203(A)(1), which allows for an immediate appeal from any order denying governmental immunity. If a case is allowed

to proceed to trial, governmental immunity is effectively lost. Governmental immunity is supposed to be a shield against the burdens of litigation, not just a defense to liability. As such, it should be decided as early in the litigation process as possible. This also means that legal issues related to governmental immunity should be resolved prior to any trial of the case. As the Supreme Court stated in *Mitchell, supra*, with respect to suits against immunized officials, “even such pretrial matters as discovery are to be avoided if possible, as ‘[i]nquiries of this kind can be peculiarly disruptive of effective government.’” *Id.* at 526 (quoting *Harlow v Fitzgerald*, 457 US 800, 817 (1982)). See also *Hunter v Sisco*, 300 Mich App 229, 243-44; 832 NW2d 753 (2013), rev’d on other grounds, 497 Mich 45; 860 NW2d 67 (2014)(reiterating that “a trial is not the proper remedial avenue to take in resolving the factual questions under MCR 2.116(C)(7) dealing with governmental immunity”)(quotation marks, brackets, and citation omitted); *Strozier v Flint Community Schools*, 295 Mich App 82, 87–88; 811 NW2d 59 (2011).

The bottom line is that if a municipal entity or employee is entitled to immunity, they should not have to expend time and resources to defend themselves through discovery or at a trial. Whether an exception to governmental immunity applies is a question of law, and it is a threshold

matter of law at that. Allowing governmental employee defendants to raise an immunity defense while simultaneously requiring that they disrupt their duties and expend time and taxpayer resources to prepare for trial “would render illusory the immunity afforded by the [GTLA].” See *Costa, supra* at 410. Accordingly, where a government entity’s entitlement to immunity is predicated on disputed facts, the trial court should resolve the factual dispute through an evidentiary hearing *prior* to trial.

CONCLUSION

Amicus curiae urges this Court to continue its narrow interpretation of the statutory exceptions to governmental immunity by holding that a parallel parking area, even though an improved portion of the highway, is not “designed for vehicular travel” and thus falls outside of the highway exception to governmental immunity. Any other interpretation of the unambiguous language of the highway exception amounts to a broad construction of the phrase contrary to the plain language of the exception, this Court’s consistently narrow interpretation of exceptions to governmental immunity, and the intent of the Legislature in drafting the language of the exception.

Furthermore, amicus curiae asks this Court to uphold the purpose of governmental immunity by protecting the municipality, not only from

liability, but from the trial itself. Allowing factual determinations regarding the application of governmental immunity to be decided at trial renders illusory the immunity afforded by the GTLA.

WHEREFORE, Amicus Curiae Michigan Municipal Risk Management Authority respectfully requests that this Honorable Court reverse the Court of Appeals' holding in *Yono v Michigan Department of Transportation*, and hold that parallel parking lanes are not "designed for vehicular travel" under the highway exception to governmental immunity.

Amicus Curiae further requests that this Court hold that questions of fact necessary to decide an immunity question as a matter of law be resolved by the trial court in an evidentiary hearing prior to trial.

Respectfully Submitted,

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Dated: September 24, 2015 (P60002)

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2015, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system (True Efiling) which will send notification of such filing to the following: Michael J. Dittenber (P72238), L. Page Graves (P51649) and all other attorneys of records and I hereby further certify that I have mailed by United States Postal Service the paper to the following non-ECF participants: N/A

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